

**Exhibit 5-A**

**Silver Complaint**

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7 Attorneys for Plaintiff Francine Silver

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES

10 FRANCINE SILVER,  
11 Plaintiff,

12 v.

13 GMAC MORTGAGE, LLC, a limited  
14 liability company,  
15 Defendant.  
16

Case No. **SC118412**

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

**VIA FAX** BOBBI TILLMON  
CASE MANAGEMENT CONFERENCE  
JAN 10 2013

Date

17 Plaintiff alleges:

- 18
- 19 1. Plaintiff is the owner in fee simple of residential property, which she  
20 occupies, located at 8613 Franklin Avenue, Los Angeles, CA 90069 (the "Property").  
21
  - 22 2. The ground for this action is wrongful foreclosure by defendant GMAC  
23 Mortgage, LLC ("GMAC"), which is not a proper party to foreclose.  
24
  - 25 3. On or about May 14, 2012, GMAC's parent company, Residential Capital,  
26 LLC ("ResCap") and affiliated entities, including GMAC, petitioned for protection under  
27 Chapter 11 of the Bankruptcy Code in the Southern District of New York (Case No. 12-  
28 12020 (MG)). On or about June 15, 2012, the Bankruptcy Court issued an interim order  
providing limited relief from the automatic stay in bankruptcy to allow, among other

1 things, actions by borrowers to defend against judicial or nonjudicial foreclosure where a  
2 final judgment allowing foreclosure has not been awarded. *Id.*, Doc. 391, Section 12(a). In  
3 accordance with that order, this action is limited to claims for declaratory and injunctive  
4 relief and does not include claims for money damages or penalties of any kind.

5 4. In 2006, plaintiff borrowed \$1,300,000 from Nationwide Lending Group  
6 ("Nationwide") to refinance the debt on the Property. The loan was evidenced by a  
7 promissory note and a deed of trust, both dated March 15, 2006.

8 5. The deed of trust identified the beneficiary as Mortgage Electronic  
9 Registration System, Inc. (MERS), "solely as nominee for Lender and Lender's successors  
10 and assigns." Plaintiff is informed and believes that MERS never had any beneficial  
11 interest in the security.

12 6. Plaintiff is informed and believes that Nationwide sold or pre-sold the loan in  
13 a series of transactions known as "securitization." In recent years, securitization has greatly  
14 expanded the capital available for residential mortgage loans and has become the most  
15 common source of the capital to fund the loans.

16 7. A typical securitization proceeds as follows. First, the lender, or "originator,"  
17 sells the loan to a sponsor, typically an investment bank. The sponsor aggregates the loans  
18 it buys into pools and transfers them to an intermediary called a depositor. The depositor  
19 creates a "special purpose vehicle," a trust, also known as a Real Estate Mortgage  
20 Investment Conduit ("REMIC"), which exists only to make the loan part of a security pool.  
21 The trust issues certificates representing shares of the pool. The pool has a cutoff date, by  
22 which time all loans to be included in the pool must have been identified, and a closing  
23 date, by which time all the assets in the pool (the promissory notes and their security  
24 interests in recordable form) must have been transferred to the trust. The sponsor, serving  
25 as an underwriter, divides the pool into tranches according to the perceived credit risk of  
26 the loans in each tranche, prices the certificates accordingly, and sells them to investors.  
27 The sponsor also contracts with an entity that services the individual loans, aggregating  
28 loan payments and performing other duties under the "Pooling and Servicing Agreement."

1 Subject to governing law, the Pooling and Servicing Agreement sets the terms of the trust.  
2 The servicer remits payments to the trustee for the trust, which remits net revenues to the  
3 investors. Thus title to individual loans vests in the trust.

4 8. Based on the findings of a securitization audit by the firm Certified Forensic  
5 Loan Auditors, LLC, plaintiff is informed and believes that her loan became, through  
6 securitization, an asset of Greenpoint Mortgage Funding Trust 2006-AR7 (the "Trust");  
7 that the trustee for the Trust was US Bank, N.A.; that the Trust was formed and to be  
8 governed by the laws of the State of New York; and that the Trust's closing date was  
9 November 30, 2006.

10 9. Plaintiff is informed and believes that at no time did US Bank have any  
11 power to transfer plaintiff's loan, and that any transfer after the closing date would have  
12 been null and void as a violation of both the Pooling and Service Agreement and New  
13 York law.

14 10. MERS exists primarily to facilitate transfers of security interests in real  
15 property as the beneficial interests in the loans change hands. MERS is supported by  
16 membership fees from numerous financial institutions. Members of MERS register their  
17 interests with MERS and self-report the transfers.

18 11. MERS maintains a public database that identifies the servicer of and the  
19 investor in a loan that a member registers with it, but an investor may choose not to display  
20 its identity in the database.

21 12. Notwithstanding MERS's role as nominee beneficiary of plaintiff's deed of  
22 trust when her loan originated in 2006, plaintiff is informed and believes based on diligent  
23 searches of the MERS public database that MERS had no record of this loan at any time  
24 before February 11, 2011, and no way to reconstruct the chain of title.

25 13. Despite its apparent lack of any record of the chain of title and despite its  
26 lack of any beneficial interest in the security, MERS purported to assign the deed of trust  
27 and promissory note to GMAC on July 5, 2011 (the "Assignment"), and GMAC purported  
28 to execute a substitution of trustee the following day.



1           14. The Assignment purported to be executed by one Jacqueline Keeley as  
2 "Assistant Secretary of MERS." The Substitution of Trustee was signed under the same  
3 name as a "GMAC Authorized Officer." Based on an expert handwriting analyst's report,  
4 plaintiff is informed and believes that one or both signatures were forged.

5           15. On July 21, 2011, plaintiff was served with a notice of default and later with  
6 a notice of trustee sale, both in the name of ETS Services, LLC, the purported substitute  
7 trustee. The sale was set for November 21, 2011, but was stayed by plaintiff's petition for  
8 bankruptcy protection.

9           16. GMAC petitioned the bankruptcy court for relief from the automatic stay on  
10 the ground that its alleged interest in property was not adequately protected. The  
11 bankruptcy court denied the motion on the ground that GMAC had failed to prove  
12 standing. Specifically, the court found that "Jacqueline Keeley's" two signatures had not  
13 been written by the same person, and that "either someone is forging signatures or this is a  
14 blatant example of robo-signing." Transcript of hearing on GMAC's motion for relief from  
15 stay, February 23, 2012, Hon. Thomas B. Donovan, Bankruptcy Judge, presiding (copy  
16 attached as Exhibit A hereto), at 2:19 to 3:9.

17           17. GMAC's residential loan foreclosure problems are the subject of an April  
18 2011 Federal Reserve Board Consent Order, available at  
19 <<http://www.federalreserve.gov/newsevents/press/enforcement/enf20110413a3.pdf>>,  
20 which requires that independent auditors review foreclosures.

21           18. More specifically, GMAC fraud in documenting residential loan assignments  
22 has been reported. An examination of New York court records by the investigative  
23 journalism bureau ProPublica found hundreds of assignment documents that were filed in  
24 the name of Ameriquest Mortgage Company by GMAC and other mortgage servicers  
25 years after Ameriquest had ceased to exist. In at least one incident, in June 2011, a GMAC  
26 employee reportedly proposed filling the gap left by a defunct lender by filing a false "lost  
27 assignment" affidavit. (ProPublica's report can be found at  
28 <<http://www.propublica.org/article/gmac-mortgage-whistleblower-foreclosure>>.

1 19. In late 2011, Phil Ting, Assessor-Recorder of the City and County of San  
2 Francisco, retained Aequitas Compliance Solutions, Inc., a mortgage regulatory  
3 compliance and consulting firm, to review 382 residential loan transactions that resulted in  
4 foreclosure sales during the period from January 2009 through October 2011. The loans  
5 that were reviewed were about 16% of all the loans that resulted in foreclosure sales. Phil  
6 Ting published the Aequitas report in February 2012. Among the findings:

7 a. In 23% of the loans, the foreclosure documents filed at the county  
8 recorder's office contradict the findings of a securitization audit as to who is the true,  
9 current owner of the loan. Report, p. 6.

10 b. In 45% of the loans, the property was sold to an entity purporting to  
11 be the beneficiary of the deed of trust when that entity was not the original beneficiary and  
12 either (1) no assignment of a beneficial interest in the loan was *ever* recorded, or (2) such  
13 an assignment was recorded only *after* the sale. *Id.*, p. 12.

14 c. The MERS database identified an investor in 192 loans. In 58% of  
15 those loans, the investor in the MERS database was not the foreclosing beneficiary as  
16 named in the trustee's deed upon sale. *Id.*, p. 13.

17 20. Plaintiff is informed and believes that, when MERS purported to assign the  
18 deed of trust and promissory note to GMAC, MERS lacked reliable information to  
19 determine who then owned the beneficial interest in the loan.

20 21. Plaintiff is further informed and believes that MERS was not specifically  
21 authorized by the then-current beneficiary of the deed of trust to assign the deed of trust  
22 and promissory note to GMAC.

23 22. Plaintiff is further informed and believes that GMAC is not the current  
24 owner of the beneficial interest in her loan.

25 23. Plaintiff's bankruptcy has now been discharged and her case has been closed.  
26 Plaintiff anticipates service of another Notice of Trustee's Sale at any time.

1 WHEREFORE, Plaintiff prays:

2 1. For judgment declaring that GMAC's Notice of Default is void and that GMAC  
3 has no right, title, or interest in the Property.

4 2. For an order temporarily and permanently enjoining GMAC and its successors,  
5 assigns, agents, and employees from taking any further action to foreclose on the Property.

6 3. For such other and further relief as the Court may deem just and proper.  
7

8  
9 Dated: September 14, 2012

Gersten Law Group

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12 EHUD GERSTEN

Attorney for Plaintiff Francine Silver  
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# Exhibit A



# ORIGINAL

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

--oOo--

In Re: ) Case No. LA11-57082-TD  
FRANCINE SILVER, ) Los Angeles, California  
Debtor. ) Thursday, February 23, 2012  
10:00 a.m.

MOTION FOR RELIEF FROM STAY  
[RP] [GILBERT YABES]

GMAC MORTGAGE, LLC VS. DEBTOR

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE THOMAS B. DONOVAN  
UNITED STATES BANKRUPTCY JUDGE

## APPEARANCES:

For the Debtor: EHUD GERSTEN, ESQ.  
3115 Fourth Avenue  
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(619) 600-0098

For GMAC Mortgage, LLC: JARED BISSELLS, ESQ.  
Pite Duncan, LLP  
4375 Jutland Drive, Suite 200  
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Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

11

1 Court Recorder:

Wanda Toliver  
United States Bankruptcy Court  
Edward R. Roybal Federal  
Building  
255 East Temple Street  
Los Angeles, California 90012

4 Transcriber:

Briggs Reporting Company, Inc.  
6336 Greenwich Drive, Suite B  
San Diego, California 92122  
(310) 410-4151

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*Briggs Reporting Company, Inc.*

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1 LOS ANGELES, CALIFORNIA THURSDAY, FEBRUARY 23, 2012 10:00 AM

2 --000--

3 (Call to order of the Court.)

4 THE COURT: Number two, Francine Silver.

5 MS. SILVER: Yes.

6 MR. GERSTEN: Your Honor, Ehud -- Ehud Gersten on  
7 behalf of the Debtor, Francine Silver.

8 THE COURT: Yes. I see Mr. Yabes -- it looks like  
9 he's signed in, but the screen tells me that he  
10 disconnected.

11 Mr. Gersten, I think I'm going to wait just a  
12 little bit to see if Mr. Gersten (sic) may have gotten  
13 called away or what happened there.

14 MR. GERSTEN: Mr. Yabes.

15 THE COURT: Mr. Yabes.

16 MR. GERSTEN: That's fine, your Honor.

17 (Pause while the Court heard other matters.)

18 THE COURT: Mr. Yabes, sir, are you there?

19 MR. BISSELL (Telephonic): Your Honor, this is  
20 Jared Bissell appearing in lieu of Mr. Yabes. I was having  
21 trouble with the court call, I do apologize.

22 THE COURT: Oh, I'm -- who is here?

23 MR. BISSELL: Jared Bissell on behalf of the moving  
24 party.

25 THE COURT: Okay, just a moment. We're -- I'm

1 dealing with some other people in the courtroom right now,  
2 but Mr. Gersten is here with his client.

3 MR. BISSELL: Thank you very much.

4 (Pause while the Court heard other matters.)

5 THE COURT: Francine Silver.

6 MS. SILVER: Yes.

7 MR. GERSTEN: Your Honor.

8 THE COURT: And I'm sorry, on the phone, would you  
9 spell your last name, please?

10 MR. BISSELL: Absolutely, your Honor. Jared  
11 Bissell, B-I-S-S-E-L-L.

12 THE COURT: Thank you. One second.

13 I've received the Debtor's opposition and I find  
14 the Debtor's opposition to be persuasive. I'm going to  
15 sustain the Debtor's opposition and deny the motion for the  
16 reason that I believe that the Debtor has established, by  
17 declarations, a reasonable doubt as to the veracity of the  
18 movant's basis for claiming the right to bring this motion.

19 I do not believe the movant has qualified under  
20 Rule 17. I do not believe the movant has established  
21 standing either under the constitutional principals, or  
22 under prudential principals, and I come to that conclusion  
23 because I believe that what I've received are documents that  
24 are not credible because of the signature of Jacqueline  
25 Keeley (phonetic), which seems to differ between two



1 documents, and based on the Debtor's handwriting expert's  
2 written testimony, it would appear that the documents were  
3 certified by two different people using the name Jacqueline  
4 Keeley and signing on behalf of the Muirs (phonetic).

5           So I think there's sufficient doubt about the  
6 veracity of the documents and I would have to conclude that  
7 either somebody was forging signatures, or this is a blatant  
8 example of robo-signing. I don't know which, I don't know  
9 why, but that's what the evidence establishes.

10           Motion denied.

11           MR. GERSTEN: Thank you, your Honor.

12           THE COURT: You're welcome. Thank you, Mr.

13 Bissell.

14           MR. BISSELL: Thank you, your Honor.

15           (Proceedings concluded.)

16  
17  
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19  
20           I certify that the foregoing is a correct  
21 transcript from the electronic sound recording of the  
22 proceedings in the above-entitled matter.

23

24           *Keeley M. Muirs*  
25           Transcriber

*3-13-12*  
                    Date

1 ROBERT J. GANDY (State Bar No. 225405)  
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17 Attorneys for Defendant  
18 GMAC MORTGAGE, LLC

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES — WEST DISTRICT  
SANTA MONICA COURTHOUSE

15 FRANCINE SILVER,  
16 Plaintiff,

17 vs.

18 GMAC MORTGAGE, LLC, a limited liability  
19 company,  
20 Defendant.

Case No. SC118412  
Assigned for All Purposes to:  
Hon. Craig M. Karlan  
Dept. N

AMENDED NOTICE OF DEMURRER  
AND DEMURRER TO COMPLAINT BY  
DEFENDANT GMAC MORTGAGE, LLC;  
AND MEMORANDUM OF POINTS AND  
AUTHORITIES

Date: April 30, 2013  
Time: 8:30 a.m.  
Cttrm.: N

Action Filed: September 17, 2012  
Trial Date: None Set

BY FAX

**NOTICE OF HEARING ON DEMURRER**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE**  
NOTICE that on April 30, 2013, at 8:30 a.m., or as soon thereafter as counsel may be heard, in  
Department N of the Los Angeles County Superior Court, the Honorable Craig M. Karlan  
presiding, located at 1725 Main Street, Santa Monica, California 90401, defendant GMAC  
Mortgage, LLC ("GMAC") demurs to the complaint of plaintiff Francine Silver and to each cause  
of action asserted against GMAC.

The demurrer is made pursuant to Code of Civil Procedure section 430.10(e) on the ground  
that plaintiff's complaint fails to state facts sufficient to constitute any cause of action against  
Defendants.

The demurrer is based on this notice and demurrer, the memorandum of points and  
authorities, the request for judicial notice, the complaint, and all other papers filed in this action.

DATED: December 4, 2012

SEVERSON & WERSON  
A Professional Corporation

By: 

DAVID M. LIU

Attorneys for Defendant  
GMAC MORTGAGE, LLC

1 **DEMURRER TO COMPLAINT**

2 **Demurrer to the First Cause of Action**

3 1. GMAC demurs to the first cause of action on the ground that it fails to state facts  
4 sufficient to constitute a cause of action. *See* Code Civ. Proc. § 430.10(e).

5 **Demurrer to the Second Cause of Action**

6 2. GMAC demurs to the second cause of action on the ground that it fails to state facts  
7 sufficient to constitute a cause of action. *See* Code Civ. Proc. § 430.10(e).

8  
9 DATED: December 4, 2012

SEVERSON & WERSON  
A Professional Corporation

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11  
12 By: 

DAVID M. LIU

13 Attorneys for Defendant  
14 GMAC MORTGAGE, LLC  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Francine Silver brings this action against defendant GMAC Mortgage, LLC ("GMAC") to argue that GMAC has no right to foreclose on real property after plaintiff defaulted on a residential loan.

Plaintiff's first theory to support this proposition is that the subject loan was placed in a Pooling and Servicing Agreement and, thus, GMAC may not foreclose on the Property. This theory does not hold water. As detailed below, the fact that a loan may be placed in such an agreement does not negate the creditor's right to foreclose. Further, plaintiff lacks standing to sue for a breach of the agreement as she is neither a party nor beneficiary to the agreement.

Plaintiff also argues that GMAC cannot foreclose because Mortgage Electronic Registration Systems, Inc. ("MERS") has no interest in the property and cannot assign the loan to another creditor. But, plaintiffs agreed in the loan documents that MERS was a beneficiary of the loan. Moreover, California law provides that MERS may act to foreclose on property and may assign any interest in the loan to another creditor.

In addition to the above problems, plaintiff lacks standing to sue. Plaintiff transferred her rights in the property into a trust and, thus, only the trustee has standing to sue.

Plaintiff has taken out nearly \$1.5 million in loans on the residence and, having defaulted, is trying any avenue to stall a foreclosure on the property. But as noted in this demurrer, all of plaintiff's theories to stall the foreclosure have no basis in the law. Accordingly, the demurrer should be sustained without leave to amend.

**II. FACTUAL BACKGROUND**

In a deed of trust, dated March 15, 2006, plaintiff and non-party Nationwide Lending Group, entered into a loan agreement whereby Nationwide Lending loaned plaintiff \$1.3 million (the "First Deed of Trust") which was secured by real property located at 8613 Franklin Avenue, Los Angeles, California 90069 (the "Property"). See Ex. 1 to GMAC's Request for Judicial Notice ("RJN").

1 On March 17, 2006, plaintiff deeded her rights to the Property to "The Leslie and Francine  
2 Silver Living Trust, UTD, Sept. 8, 1999, Francine Silver Trustee" (the "Trust"). See Ex. 2 to RJN.

3 In another deed of trust, dated September 7, 2007, plaintiff obtained a subsequent loan  
4 from JPMorgan Chase Bank for \$170,000 which was also secured by the Property. See Ex. 3 to  
5 RJN.

6 On July 5, 2011, the First Deed of Trust was assigned to GMAC Mortgage, LLC (fka  
7 GMAC Mortgage Corporation). See Ex. 4 to RJN.

8 On July 6, 2011, the trustee on the First Deed of Trust became Executive Trustee Services,  
9 LLC dba ETS Services, LLC. See Ex. 5 to RJN.

10 Plaintiff defaulted on the First Deed of Trust and a notice of default was recorded on the  
11 Property on July 22, 2011. See Ex. 6 to RJN.

12 Plaintiff failed to cure the default and a notices of trustee's sale for the First Deed of Trust  
13 were recorded on the Property on October 24, 2011. See Ex. 7 to RJN.

### 14 **III. ARGUMENT**

#### 15 **A. Standard On Demurrer**

16 For the purposes of testing the sufficiency of the pleadings, the demurrer assumes the truth  
17 of the well-pleaded factual allegations of the complaint. See *City of Dinuba v. County of Tulare*,  
18 41 Cal. 4th 859, 865 (2007). A demurrer does not, however, assume the truth of "contentions,  
19 deductions or conclusions of fact or law." *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985); see also  
20 *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 967 (1992).

21 Additionally, a demurrer may be based on matters appearing on the face of a complaint or  
22 on matters of which the court is required or requested to take judicial notice. See Code Civ. Proc.,  
23 § 430.30(a). The Court may consider the contents of any documents attached as exhibits to the  
24 complaint. See *Frantz v. Blackwell*, 189 Cal. App. 3d 91, 94 (1987). To the extent allegations in  
25 the complaint contradict such exhibits, courts "rely on and accept as true the contents of the  
26 exhibits...." *Barnett v. Fireman's Fund Insurance Co.*, 90 Cal. App. 4th 500, 505 (2001).

1           **B.     Plaintiff Lacks Standing To Sue As She Transferred Her Interest In The**  
2                               **Property To A Trust**

3           A trustee is the real party in interest to sue on behalf of a trust. "An executor or trustee of  
4 an estate is the real party in interest for purposes of bringing a claim on behalf of those estates."  
5 *O'Flaherty v. Belgum*, 115 Cal. App. 4th 1044, 1062 (2004).

6           Here, plaintiff (as an individual) transferred her interest in the Property to the Trust.  
7 Accordingly, any claim with respect to foreclosure on the Property resides in the Trust and not  
8 with plaintiff. As plaintiff does not have standing to sue, the demurrer should be sustained.

9           **C.     Plaintiff's First Claim For Declaratory Relief Fails Because She Lacks**  
10                           **Standing To Sue For Any Alleged Violation Of A Pooling And Servicing**  
11                           **Agreement And Any Such Agreement Does Not Negate GMAC's Right To**  
12                           **Foreclose On The Property**

13               **1.     An Actual And Present Controversy Must Exist To Support A**  
14                           **Declaratory Relief Claim**

15           California Code of Civil Procedure section 1060 allows any person "[i]nterested under a  
16 written instrument, excluding a will or trust, or under a contract, or who desires a declaration of  
17 his or her rights or duties with respect to another, or in respect to, in, over or upon property..." to  
18 seek a judicial declaration of his, her, or its rights and duties in the premises, including a  
19 determination of any question of construction or validity arising under the instrument or contract.

20           California Code of Civil Procedure section 1061 provides that the court may refuse to  
21 exercise the power to grant declaratory relief in any case in which its declaration or determination  
22 is not necessary or proper at the time under all the circumstances.

23           The purpose of declaratory relief is to eliminate uncertainties that may result in future  
24 litigation, and, hence, to quiet or stabilize an uncertain or disputed legal relations by permitting a  
25 prompt adjudication of the respective rights and obligations of the parties. *See Marina*  
26 *Development Co. v. County of Los Angeles*, 155 Cal. App. 3d 435, 443 (1984); *City of Tiburon v.*  
27 *Northwestern Pac. R.R. Co.*, 4 Cal. App. 3d 160, 173 (1970); *Lortz v. Connell*, 273 Cal. App. 2d  
28 286, 301 (1969). Declaratory relief enables the parties to shape their future conduct to avoid the



1 breach of an obligation. *See Babb v. Superior Court of Sonoma County*, 3 Cal. 3d 841, 848  
2 (1971).

3 An action for declaratory relief is authorized only when an actual controversy relating to  
4 the legal rights and duties of the respective parties exists. *See* Cal. Civ. Proc. Code § 1060. A  
5 justiciable controversy must be definite, concrete, and touching the legal relations of parties  
6 having adverse interests. *See LePage v. Oakland*, 13 Cal. App. 3d 689, 692 (1970). When only  
7 past wrongs are involved there is no basis for declaratory relief. *See County of San Diego v. State*  
8 164 Cal. App. 4th 580, 607–608 (2008).

9 Declaratory relief is superfluous if another cause of action would resolve the alleged  
10 dispute. “The object of the [declaratory relief statute] is to afford a new form of relief where  
11 needed and not to furnish a litigant with a second cause of action for the determination of identical  
12 issues.” *Hood v. Superior Court*, 33 Cal. App. 4th 319, 321–324 (1995).

13 **2. Declaratory Relief Is Not Necessary Because Plaintiff Cannot Show**  
14 **That Any Actual And Present Controversy Exists Regarding The**  
15 **Foreclosure**

16 Plaintiff alleges at length that Defendants have no authority to foreclose on the Property  
17 because the loan was securitized through a Pooling and Service Agreement (“PSA”). *See* Compl.,  
18 ¶¶ 6 to 9.

19 Courts have rejected claims that companies lose their power of sale pursuant to the deed of  
20 trust when the original promissory note is securitized and assigned to a trust pool. *See Benham v.*  
21 *Aurora Loan Servs.*, 2009 WL 28880232, \*3 (N.D. Cal. 2009); *Hafiz v. Greenpoint Mortg.*  
22 *Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009); *Mulato v. WMC Mortg. Corp.*, 2010  
23 WL 1532276, at \*2 (N.D. Cal. 2010).

24 Courts have also rejected the notion that the securitization of a loan results in the  
25 separation of the note and deed of trust which would allegedly prohibit foreclosure on the  
26 Property. *See Christopher v. First Franklin Fin’l Corp.*, 2010 WL 1780077, at \*\* 2-3 (S.D. Cal.  
27 2010); *Labra v. Cal-Western Reconveyance Corp.*, 2010 WL 889537, at \*\* 12-15 (N.D. Cal.  
28 2010); *Saxon Mortg. Services v. Hillery*, 2009 WL 2435926, at \*\* 4-5 (N.D. Cal. 2009).



1 Further, plaintiff does not have standing to challenge the securitization of the loan and  
2 whether the loan was properly transferred in accordance with the Pooling and Servicing  
3 Agreement, as plaintiff has failed to demonstrate she is a party or beneficiary to the Pooling and  
4 Servicing Agreement. *See Christopher v. First Franklin Fin. Corp.*, 2010 WL 3895351, at \*4  
5 (S.D. Cal. Sept. 29, 2010); *Armeni v. Am.'s Wholesale Lender*, 2012 WL 603242, at \*3 (C.D. Cal.  
6 Feb. 24, 2012) ("The Court finds that plaintiff lacks standing to challenge the process by which his  
7 mortgage was (or was not) securitized because he is not a party to the PSA."); *Armstrong v. Chevy*  
8 *Chase Bank, FSB*, 2012 WL 4747165, at \*2-\*3 (N.D. Cal. Oct. 3, 2012) ("Plaintiffs theory of  
9 liability fails to support a plausible claim because Plaintiffs lack standing to allege a breach of the  
10 PSA. Indeed, they are neither direct parties to nor third-party beneficiaries of that agreement.").

11 Thus, the theory that the PSA prevents a foreclosure lacks merit. That plaintiff's loan may  
12 have been securitized and governed by a pooling and servicing are not grounds to invalidate the  
13 loan on the Property. The demurrer should be sustained without leave to amend.

14 **3. MERS May Foreclose On The Property And Assign The Deed Of Trust**

15 Plaintiff alleges that MERS has no interest in the subject loan and could not assign the  
16 loan. *See* Compl., ¶¶ 10 to 14, 20 to 22. Plaintiff's conclusory allegation that MERS could not  
17 foreclose on the Property or assign the loan is not supported by the law. As held in *Gomes v.*  
18 *Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1151 (2011) ("*Gomes*"), the purpose of  
19 MERS is:

20 MERS is a private corporation that administers the MERS System, a national  
21 electronic registry that tracks the transfer of ownership interests and servicing  
22 rights in mortgage loans. Through the MERS System, MERS becomes the  
23 mortgagee of record for participating members through assignment of the  
24 members' interests to MERS. MERS is listed as the grantee in the official  
25 records maintained at county register of deeds offices. The lenders retain the  
26 promissory notes, as well as the servicing rights to the mortgages. The lenders  
27 can then sell these interests to investors without having to record the  
28 transaction in the public record. MERS is compensated for its services through  
fees charged to participating MERS members.

1 The *Gomes* court held that the rules governing non-judicial foreclosure [Civil Code  
2 sections 2924 *et seq.*] were the *only* rules governing non-judicial foreclosure. *See id.* at 1154.  
3 Thus, a plaintiff cannot seek a judicial determination that MERS could not foreclose on real  
4 property.

5 Further, plaintiffs agreed in the deed of trust that MERS was the nominal beneficiary and  
6 could non-judicially foreclose upon plaintiffs' default on the loan. *See id.* at 1157. The *Gomes*  
7 decisions was affirmed in *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 258, 268-73  
8 (2011) ("*Fontenot*"). In *Fontenot*, the court stated that the *Gomes* decision was rightly decided.  
9 *See id.*

10 Further, the *Fontenot* court held that a plaintiff bore the burden of establishing that any  
11 assignment to MERS was improper because plaintiff was challenging the propriety of the  
12 foreclosure proceedings. *See id.* The court also held that MERS, as nominee for the lender, could  
13 assign a note as an agent for the lender. *See id.* Furthermore, simply alleging that an assignment  
14 is improper is not enough – plaintiff must establish that there was absolutely no assignment of the  
15 note and deed of trust to the foreclosing lender. *See id.*

16 Here, like in *Gomes*, plaintiff agreed in the First Deed of Trust that MERS was a nominee  
17 and beneficiary for the loan. *See Ex. 1 to RJN*, page 1. In short, MERS may act as a beneficiary  
18 under a deed of trust and may, in that capacity, commence non-judicial foreclosure based upon the  
19 borrowers' default.

#### 20 **4. Declaratory Relief Is Not Necessary**

21 Declaratory relief is unnecessary because, as detailed in this demurrer, all of the remaining  
22 causes of action fail as to Defendants. Without a need for adjudicating the rights and obligations  
23 between plaintiff and Defendants, declaratory relief is unnecessary.

#### 24 **D. The Second Cause of Action For Injunctive Relief Fails Because It Is Only A** 25 **Remedy And Is Not A Cause Of Action**

26 Injunctive relief is not a cause of action. It is a remedy that must be tethered to some  
27 independent legal duty. *See McDowell v. Watson*, 59 Cal.App.4th 1155, 1159 (1997). Thus, this  
28 purported "claim" fails as a matter of law.

1 **IV. CONCLUSION**

2 For the foregoing reasons, GMAC respectfully requests the Court to sustain the demurrer  
3 to the complaint, in its entirety, without leave to amend.  
4

5 DATED: December 4, 2012

SEVERSON & WERSON  
A Professional Corporation

7  
8 By: 

DAVID M. LIU

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10 Attorneys for Defendant  
11 GMAC MORTGAGE, LLC  
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**PROOF OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is The Atrium, 19100 Von Karman Avenue, Suite 700, Irvine, CA 92612.

On December 4, 2012, I served true copies of the following document(s): **AMENDED NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT BY DEFENDANT GMAC MORTGAGE, LLC; AND MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

Ehud Gersten, Esq.  
GERSTEN LAW GROUP  
3115 Fourth Avenue  
San Diego, CA 92103

Attorneys for Plaintiff FRANCINE SILVER

Telephone: (619) 600-0098  
Email: egersten@gerstenlaw.com

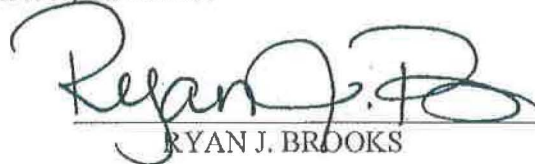
☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing via Certified Mail, Return Receipt Requested, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2012, at Irvine, California.

  
RYAN J. BROOKS